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IN THE

Supreme Court of the United States

October Term, 1952.

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,

Petitioners,

vs.

CHARLES E. WILSON, Secretary of Defense, Harold E. Talbot, Secretary of the Air Force, General Hoyt S. Vandenberg, Chief of Staff, United States Air Force.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully present this petition for rehearing on the following grounds:

I.

Petitioners were not afforded adequate opportunity to submit their view on the issues on which decision here was based.

Because of the unsettled nature of the law at the time of the submission of this cause, petitioners had no opportunity to address themselves to what now appears to be

the decisive question—whether petitioners' claimed denials of due process were given "fair consideration" by the military.

The District Court dismissed the petitions for writs of habeas corpus on the ground that its inquiry was limited solely to the question of whether the military tribunal had jurisdiction in the narrow sense. 104 F. Supp. 310. On appeal, the sole issue submitted in briefs and argued orally was whether the scope of inquiry on habeas corpus could reach those questions of due process raised in each petition. The Court of Appeals affirmed but defined the reach of habeas corpus under a new rule similar to that applicable in state custody cases. 202 F. 2d 335.

When the cause reached this Court, petitioners had to address themselves to attacking the bases on which the lower courts had denied hearings on the merits in the District Court. Those judgments are now affirmed, but again on a different basis.

Petitioners realize that Mr. Chief Justice Vinson, Mr. Justices Burton, Clark, Reed and possibly Mr. Justice Jackson feel that fair consideration was given by the military to each of petitioners' claims. But this issue was not clearly before the Court and petitioners had no adequate opportunity to address argument on this point. "Fair consideration" means, in our understanding, a determination of constitutional due process under applicable standards of this Court. It certainly cannot encompass decisions based upon factors which are not a part of this record and which, therefore, cannot be properly weighed. These problems were not developed nor considered in the submission of this cause. Petitioners do not seek merely to reargue claims made in the military process, but if the scope of inquiry on habeas corpus may reach the question of whether claims of denial of due process were fairly considered by military courts, then petitioners should be permitted to address themselves to that question before their sentences are ordered executed.

II.

At no point in the military process were the standards of this Court on a determination of the voluntary nature of a confession applied to petitioner Dennis' claims that his confessions had been coerced.

The principal opinion in this case declares that "the military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." Petitioners do not discern any substantial difference between this view and that of Mr. Justice Douglas. Petitioners read this to mean that a majority of this Court agree that an accused before military courts must be accorded procedural due process pursuant to constitutional guarantees. In the light of the opinion of the Chief Justice, however, the crucial question is whether a claimed denial of constitutional rights was given "fair consideration" by the military authorities.

Petitioner Dennis claims that he was convicted by the use of involuntary confessions. To give "fair consideration" to this claim, we submit, the military courts must look to the concept of voluntariness as evolved by this Court. They must look to the gloss which this Court has added—the gloss of *Lisenba* v. *California*, 314 U. S. 219; *Malinski* v. *New York*, 324 U. S. 401; *Haley* v. *Ohio*, 332 U. S. 596; *Watts* v. *Indiana*, 338 U. S. 49. The constitutional rights of those subject to the military jurisdiction will have real meaning only if the military conscientiously applies the constitutional standards set forth by this Court. Unless the military is required to do this, binding effect will be given to military adjudications on questions of constitutional law which are contrary to decisions of this Court. This, we submit, the Court cannot permit. 28 U. S. C. 2241. See *Brown* v. *Allen*, — U. S. —, 97 L. Ed. (Advance pp. 375, 412, 413).

1. Constitutional Standards Of This Court Applicable To This Case.

While there has been disagreement in the application of the Court's standards to varied fact situations, there is certainly no disagreement with the position of Mr. Justice Roberts *"that where a prisoner held incommunicado is subjected to questioning by officers for long periods, and deprived of the advice of counsel, we shall scrutinize the record with care to determine whether, by the use of his confession, he is deprived of liberty or life through tyrannical or oppressive means."* *Lisenba* v. *California, supra,* at 240 (italics supplied).

As recently as *Stein* v. *New York,* — U. S. — 21 U. S. L. Week 4469, 4477 (June 15, 1953) this Court stated that the fact that an accused is held in custody for a prolonged period of time incommunicado is relevant circumstantial evidence in the inquiry as to physical and psychological coercion.

In scrutinizing the record, this Court has always given full consideration to the age of the accused, his intelligence and education and all other factors which throw light on the question whether the confession was really the result of psychological coercion which overpowered mental resistance. *Haley* v. *Ohio, supra; Ward* v. *Texas,* 316 U. S. 547; *Lisenba* v. *California, supra; White* v. *Texas,* 310 U. S. 570; *Chambers* v. *Florida,* 309 U. S. 227. In *Stein* v. *New York, supra,* Mr. Justice Jackson stressed the fact that the defendants "were not young, soft, ignorant or timid," and "were not inexperienced in the ways of crime or its detection", nor "dumb as to their rights."

2. The Undisputed Facts Here.

The undisputed facts here are that petitioner Dennis was held incommunicado for five days without benefit of counsel prior to his first confession and subjected to

repeated questioning. He was only twenty years of age and below average in intelligence.[1] He was a Negro, held in custody thousands of miles from home and friends, interrogated by military superiors, see *United States* v. *Monge*, 2 CMR 1, 4 (CMA 1952), and charged with a crime which stirs frenzied emotions—rape of a white girl.

3. Standards Applied By The Military.

The military, however, did not apply this Court's standards, but its own, to these undisputed facts. The Judge Advocate General of the Air Force disposed of petitioner Dennis' claim with the observation that where evidence as to coercion is conflicting, the question is properly one for the triers of fact. (App. B, Respondent's brief, p. 101.) See also 4 CMR (AF) 906. The Judicial Council disposed of this contention similarly. 4 CMR (AF) 899-900. The Board of Review considered only the intensity of interrogation and did not evaluate or consider the fact that petitioner was held incommunicado, his intelligence and education, his race, the nature of the crime charged, and distance from home and friends in determining the voluntary nature of these confessions. 4 CMR (AF) 885. Clearly the military reviewing authorities did not "scrutinize the record with care" in the light of the applicable decisions of this Court.

Thus, in order to resolve the question of whether petitioner's claim was given "fair consideration", it becomes crucial to examine the standards applied by the triers of fact. At the trial, the Law Member's instructions with respect to the confession contained no definition whatever of voluntariness. His entire charge on this point was as follows:

> "The ruling is that all four of the purported documents will be received in evidence. In connec-

[1] The record shows that his Army AGCT test score was only 70. 4CMR (AF) 906. He just misses being an illiterate which is the classification of those scoring 69 or below.

tion with this ruling, the law member calls attention of the court to *paragraph 127a* of the *Manual for Courts-Martial, 1949,* reading in part as follows:

> "'The ruling of the law member that a particular confession or admission may be received in evidence is not conclusive of the voluntary nature of the confession or admission. Such a ruling merely places the confession or admission before the court. The ruling is final only on the question of admissibility. Each member of the court, in his deliberation upon the findings of guilt or innocence, may come to his own conclusion as to the voluntary nature of the confession or admission and accept or reject it accordingly. He may also consider any evidence adduced as to the voluntary or involuntary nature of the confession or admission as affecting the weight to be given thereto.'" (Dennis, C. M. Tr. 275).

Nowhere is there an adequate exposition of the standards for voluntariness set forth by this Court. The pertinent portions of the Manual on this point follow:

> "No hard and fast rules for determining whether a confession or admission was voluntary are here prescribed. Some instances of coercion or unlawful influence in obtaining a confession or admission are:
>
> "(1) Infliction of bodily harm, including prolonged questioning accompanied by deprivation of the necessities of life (food, sleep, adequate clothing, etc.).
>
> "(2) Threats of bodily harm.
>
> "(3) Imposition of confinement or deprivation of privileges or necessities because a state-

ment is not made by the accused, or threats of the same if a statement is not made.

"(4) Promises of immunity or clemency with respect to an offense allegedly committed by the accused.

"(5) Promises of reward or benefit, of a substantial nature, likely to induce a confession or admission from the particular accused." MCM (AF), 1949 at 158.

Even assuming that the triers of fact sought to use these examples as guides for determining whether these confessions were voluntary, no help was furnished in making an evaluation of the undisputed facts adduced here. Examples one and three come closest to this case, but neither, because of their inherent limitations, are applicable here.[2]

Thus the triers of fact, in determining whether petitioner's confessions were voluntary, were not required to weigh or evaluate the coercive effect of his prolonged detention without the advice of counsel or friends, his age or his intelligence, his race in connection with the crime charged or the questioning to which he was subjected.

Nowhere were these factors considered in determining the question of voluntariness at any point in the military establishment. Nowhere were the guides and standards of this Court applied. Thus, we submit, it cannot be said that this claim was fairly considered by the military authorities.

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[2] Example one contains the clear implication that prolonged questioning cannot be considered coercion unless it is accompanied by a deprivation of the necessities of life. Example three relates only to confinement or deprivation of privileges or necessities or threats of the same resulting from an accused's refusal to make a given statement.

III.

The allegations outside the courts-martial record were considered only on the application for new trial.

Certain claimed denials of constitutional rights were considered for the first time on petitioners' applications for new trials pursuant to former Article of War 53. These claims involved the use of perjured testimony, attempted subornation of perjury by the prosecution, intimidation and harassment of defense witnesses, the knowing use of planted evidence and suppression of evidence, and the conduct of the trial in an atmosphere of terror and mob violence. After refusing to consider the affidavit of Calvin Dennis, the government's witness, that he testified falsely on the grounds that there was "little to inspire confidence or recommend credence in his affidavit" (App. C, Brief for Respondents, pp. 120-122), the Judge Advocate General disposed of the other claims recited here on the basis of a confidential investigation. No doubt witnesses were interrogated, but these witnesses were unknown to petitioners and their confidential testimony—not subject to cross-examination—was the basis for the Judge Advocate General's conclusions. As the Chief Justice points out, this proceeding is not a part of the record of this case. Therefore, it cannot form the basis for a conclusion that "fair consideration" was given to these claims.

With respect to the charges that perjured testimony and planted evidence were used, the principal opinion of the Court expressly states that its conclusion is not predicated on the investigation and confidential report of the Judge Advocate General. Rather, these charges are disposed of on the ground that they were "either explored or were available for exploration at the trial."

The charges relating to the knowing suppression of evidence, attempted subornation of perjury and efforts to

intimate those who sought to help petitioners and the conduct of the trials in an atmosphere of hysteria and mob violence are not dealt with in the opinion of the Chief Justice. We assume, however, that these charges were disposed of on the same ground alluded to above. Since the Chief Justice disposes of all of these charges without relying on the confidential report of the Judge Advocate General, what the opinion of the Chief Justice really seems to be stating, we submit, is not that the military gave "fair consideration" to all these charges, but merely that petitioners have no right to raise subsequently charges which were available for exploration at the trial. This is indeed a harsh doctrine, especially where the lives of two soldiers are at stake.

The charge that Calvin Dennis' testimony was perjured was explored at the trial of petitioner Burns only in the sense that Calvin Dennis was interrogated with respect to the voluntariness of his statement and was subsequently cross-examined by defense counsel. But Calvin Dennis' retraction, as well as the corroborating statements of Colonel Daly and Mrs. Hill, became available to petitioners only after both trials terminated. It may well be that Hill and Daly had this information at the time of the trial. But knowledge on their part is not in fact or in the law knowledge of petitioners or their counsel.

The charges relating to knowing suppression of evidence, attempted subornation of perjury and intimidation of those who sought to help petitioners were in no way explored at the trial. Here, too, this information may have been in the possession of affiants Chaplain Grimmett, Colonel Daly and Mrs. Hill. It should be stressed that Chaplain Grimmett did not testify at either trial. Daly and Hill were called as defense witnesses in the Dennis trial solely on the point of the voluntariness of the confession. Their total testimony for the defense consumes a mere 2½ typewritten pages. It seems perfectly clear

that defense counsel had no knowledge of what additional information they might possess and no reason for so suspecting. Mrs. Hill did not testify at the Burns trial. Daly testified only as a prosecution witness and his testimony was confined to facts relating to his handling of prosecution's exhibit 17, the victim's smock.

For reasons only known to them, affiants Grimmett, Hill and Daly failed to disclose all at the time of the trial. The concerted effort by the prosecution to harass, intimidate, and suppress all aid to the defense may well explain their silence. There can be no inference that petitioners or their counsel had this knowledge when these men were tried.

In this connection, the Court's attention is directed to the fact that Francis L. Moylan, a witness for the prosecution, wrote the Court of Appeals while this case was there pending, that he was not permitted to testify that he had seen two other men at the scene of the crime, although he tried to bring this out. 202 F. 2d at 346 and note 73 at 351.

Further, that the investigation was carried on against a background of "extreme tension" was admitted by the prosecution's own witness (Dennis, C. M. Tr. 207). That the prosecution was guilty of attempted subornation of perjury in the case of Mrs. Hill is admitted by the Judge Advocate General of the Air Force. 4 CMR (AF) 906. It is a strange irony that the prosecution's campaign of intimidation and attempted subornation of perjury now reaps its reward in this Court's doctrine that the silence of Daly, Hill and Grimmett deprives petitioners of the opportunity to raise these serious charges of denials of fundamental due process.

The effect of the decision of this Court is to impute the knowledge of the three affiants to petitioners. Affiants' failure to disclose this information results in a waiver of petitioners' constitutional rights. Because of affiants' silence, petitioners go to their death. Such is not the stuff of which procedural due process is made.

CONCLUSION

For these reasons, we respectfully urge that this petition for rehearing should be granted.

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Dated: June 29, 1953.

Certificate of Counsel

It is hereby certified to this Court that this petition for rehearing is presented in good faith and based upon a firm conviction that the questions raised in this petition should be fully presented to this Court in brief and on oral argument. It is further certified that this petition is not presented for purposes of delay.

ROBERT L. CARTER,
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THURGOOD MARSHALL.